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DEC
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No. 99-528

In the Supreme Court of the United States

DAVID A. FIELDS, ET AL., PETITIONERS

v.

DEPARTMENT OF LABOR,
ADMINISTRATIVE REVIEW BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming a summary decision by the Department of Labor's Administrative Review Board that petitioners engaged in reckless conduct that took them outside the scope of the whistleblower protections of the Energy Reorganization Act of 1974, 42 U.S.C. 5851.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 173 F.3d 811. The final decision and order of the Department of Labor's Administrative Review Board (Pet. App. 9-38) is available at 1998 WL 122759. The recommended decision and order of the administrative law judge (Pet. App. 39-71) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1999. A petition for rehearing was denied on June 28, 1999 (Pet. App. 7-8). The petition for a writ of certiorari was filed on September 27, 1999. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Florida Power Corporation (FPC) operates a nuclear power plant and is therefore subject to a comprehensive regulatory scheme administered by the Nuclear Regulatory Commission (NRC). See 42 U.S.C. 2131, 2133, 5841(f). Petitioners worked as control room operators in the plant and were also required to be licensed and to comply with the NRC's regulations. Pet. App. 3, 11; 10 C.F.R. 55.3, 55.53(d). One of those regulations prohibits a "change, test or experiment [that] involves a change in the technical specifications incorporated in the [operator's] license or an unreviewed safety question" without prior NRC approval. 10 C.F.R. 50.59(a)(1) (to be amended effective Jan. 4, 2000, see 64 Fed. Reg. 53,612-53,613 (1999)).

Section 211(a)(1) of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5851(a)(1), prohibits discrimination against employees who, among other things, notify their employers of alleged violations of statutes regulating the nuclear industry or who take part in proceedings under the ERA or the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.* Under Section 211(g), however, the whistleblowing protections of Section 211(a) do not apply "to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation" of those statutes. 42 U.S.C. 5851(g). Congress has provided for the Secretary of Labor to adjudicate claims of discrimination under Section 211(a), and she in turn has delegated that authority to the Department's Administrative Review Board (ARB or Board), which is the federal respondent in this case. See 29 C.F.R. 24.8(a); 61 Fed.

Reg. 19,978 (1996). The Board's final decisions are subject to judicial review, which "shall conform" (42 U.S.C. 5851(c)(1)) to the review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

2. In April 1993, respondent FPC began operating under a new engineering calculation, called "Curve 8," that affected the level of hydrogen pressure in a storage vessel that was used to maintain water levels in the nuclear reactor's coolant system. Pet. App. 11-12, 42. Petitioners believed that maintaining hydrogen pressure in accordance with "Curve 8" was unsafe, and they expressed that view to FPC's engineering department and its manager of nuclear operations. *Id.* at 3, 12, 42. FPC's managers continued to direct operators to maintain maximum hydrogen pressure allowed by "Curve 8," however, and an NRC inspector suggested that, if petitioners still had safety concerns, they should raise them formally with the NRC. *Id.* at 13. On September 2, 1994, petitioners received a draft memorandum from FPC's engineering department stating that "Curve 8" was "accurate and reasonably conservative." *Id.* at 3, 13.

Petitioners subsequently decided to conduct their own tests to determine whether "Curve 8" was safe. Pet. App. 3, 13, 42. During the midnight shift on September 4, 1994, while the nuclear reactor was operating at full power, petitioners added hydrogen to the storage tank, which triggered an alarm light indicating that the pressure was too high, and then rapidly reduced the water level, which kept the alarm triggered for 43 minutes. *Id.* at 3, 14, 42-43. Because the data from this test were inconclusive, petitioners did a similar test on September 5, 1994, which triggered the alarm for 35 to 37 minutes. *Id.* at 3-4, 14, 43. During the second test, petitioners warned a plant employee to "dress out" in

protective clothing so that he could take emergency action in the event of an accident. *Id.* at 3-4, 14.

At the time of these tests, petitioners did not know that "Curve 8" was a "design basis" that should never be exceeded, Pet. App. 14-15, although they suspected that it was "nonconservative," *id.* at 33, and were aware that a catastrophe could occur if there was a coolant accident while the hydrogen pressure was too high, *id.* at 34, 42; Pet. 4. They subsequently alleged in these proceedings that they believed at the time that the planned tests complied with existing procedures and were within their authority. Pet. App. 3, 13 They admitted, however, that no one had ever before unilaterally raised the hydrogen pressure and water to the maximum levels and then rapidly drained the water as they did, *id.* at 24, 45, and that they did not consult with FPC's engineering department or managers or with the NRC before they conducted their own tests, *id.* at 13, 44. Following the tests, petitioners prepared a report, based on the September 5 test, which confirmed their concerns about "Curve 8." See *id.* at 15.

FPC reported the September 5 test to the NRC, which ultimately concluded that petitioners had violated 10 C.F.R. 50.59 by conducting unauthorized tests of hydrogen pressure in the storage tank. Pet. App. 17 n.9. In July 1995, FPC management first learned of the September 4, 1994 test, which petitioners had not previously divulged. *Id.* at 15-16; see *id.* at 4. FPC subsequently discharged petitioners Fields and Weiss, and disciplined petitioner Stewart, "for violation of procedures and failure to disclose the full intent, details, and existence of the September 4, 1994 test." *Id.* at 16. Petitioners then filed complaints with the Department of Labor, alleging that FPC had discriminated against them in violation of Section 211(a).

3. After a hearing (see Pet. App. 40), a Department of Labor administrative law judge (ALJ) recommended that the ARB enter a summary decision for FPC under Section 211(g). *Id.* at 40-44, 68; see 29 C.F.R. 24.7(c) and (d).[1] The ALJ construed that provision to require proof (1) that petitioners acted without direction by FPC, (2) that they acted deliberately, and (3) that their actions caused a violation of nuclear statutes. Pet. App. 41-60. The ALJ concluded that, under "the irrefutable facts" (*id.* at 60), FPC had satisfied that standard. *Id.* at 60-65.

The ARB accepted the ALJ's recommendation and dismissed petitioners' complaint. Pet. App. 9-38. The Board first noted that the standard for granting a summary decision in a whistleblower case is the same as the standard for granting summary judgment under Rule 56 of the Federal Rules of Civil Procedure: the moving party must show that there is no material issue of fact and that it is entitled to prevail as a matter of law. Pet. App. 18. The Board applied that standard and concluded that summary decision for FPC was appropriate because petitioners had acted without direction from FPC, *id.* at 19-25, and had "deliberately cause[d]" a violation of the NRC's prohibition against unauthorized tests, *id.* at 17 & n.9, 25-35.

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[1] The Department's rules of practice and procedure allow an ALJ to "enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. 18.40(d). Such a decision must include, among other things, "[f]indings of fact and conclusions of law" on all issues presented. 29 C.F.R. 18.41(a)(2)(i). Where a genuine issue of material fact is raised, the ALJ shall set the case for an evidentiary hearing. 29 C.F.R. 18.41(b).

Disagreeing with the ALJ's interpretation of Section 211(g), the Board ruled that a complainant "deliberately causes" a violation under Section 211(g) when he or she acts "willfully"—that is, either knowing that a violation will occur or with "reckless disregard" for whether a violation will occur. Pet. App. 27-28. The Board found that standard satisfied here. *Id.* at 33-35. It recognized that petitioners did not have actual knowledge that their actions would cause a violation, but it concluded that their actions were nonetheless reckless. *Id.* at 33. It reasoned that petitioners could have brought their concerns about "Curve 8" to higher managers in FPC or to the NRC, but that they chose not to do so. *Ibid.* "[I]n light of the inherent danger involved in operating a nuclear plant and the existence of other avenues of redress for their suspicions about Curve 8," the Board concluded that petitioners had "acted with reckless disregard" of whether their activities violated nuclear safety requirements. *Id.* at 35; see *id.* at 17 & n.9, 26 n.13.

4. The court of appeals affirmed. Pet. App. 1-6. The court first noted that the ARB had found "no genuine issue of material fact" and had "determined that FPC had established a valid Section 211(g) affirmative defense as a matter of law." *Id.* at 4. The court also recognized that, under 42 U.S.C. 5851(c)(1), the standard governing its review of the ARB's decision had to conform to the Administrative Procedure Act, under which agency action may be set aside "only if it 'is unsupported by substantial evidence or if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Pet. App. 5 (quoting 5 U.S.C.

706(2)(A) and (E)).[2] The court found it "clear from the record that, regardless of their motives, good or bad, petitioners moved knowingly and dangerously beyond their authority when, on their own, and fully aware that their employer would not approve, they conducted experiments inherently fraught with danger." *Id.* at 5-6. In a concluding sentence, the court added that the Board's "determination was reasonable and supported by substantial evidence contained in the record." *Id.* at 6.

ARGUMENT

Petitioners claim that the court of appeals erred by applying a "substantial evidence" standard in reviewing the ARB's summary determination under Section 211(g). But this case does not turn, as petitioners assert, on any factual dispute concerning their state of mind; instead, it turns on the Board's legal interpretation of Section 211(g), which petitioners do not challenge, and on the application of that interpretation to the objective circumstances surrounding the conduct in which petitioners indisputably engaged. For that reason, this case would be an inappropriate vehicle for addressing any issue concerning the standard for reviewing the ARB's factual determinations under the ERA.

1. Under the Board's interpretation of Section 211(g), which petitioners concede is "correct" (Pet. 13), an employee "deliberately causes" a violation of nuclear safety statutes when he or she acts *either* with

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[2] The government argued below (Br. 23) that the court of appeals should review the Board's decision de novo, while deferring to the Board's legal interpretation of the statutory phrase "deliberately causes." Respondent FPC advocated a "substantial evidence" standard (Br. 18-21).

knowledge that a violation will occur "*or* with reckless disregard" of whether a violation will occur. Pet. App. 32 (emphasis added). Here, the Board found that petitioners had acted in "reckless disregard" of whether their activities would violate, among other things, the NRC's prohibition against unauthorized tests. *Id.* at 33-35; see *id.* at 17 & n.9 (discussing petitioners' violation of 10 C.F.R. 50.59), 26 n.13 (finding that petitioners "engaged in deliberate misconduct" even under their own approach to *scienter*).

Petitioners appear to assume that any inquiry into "reckless disregard" requires factfinding on the subject of their "motive[s]," "intent," and "beliefs." Pet. 23-24. That is incorrect. "The civil law generally calls a person reckless who acts * * * in the face of an unjustifiably high risk of harm that is either known *or so obvious that it should be known.*" *Farmer* v. *Brennan*, 511 U.S. 825, 836 (1994) (emphasis added) (citing, *inter alia*, Restatement (Second) of Torts § 500 (1965)); see also *Screws* v. *United States*, 325 U.S. 91, 106 (1945) (plurality opinion); compare *Kolstad* v. *American Dental Ass'n*, 119 S. Ct. 2118, 2125 (1999) (discussing, for purposes of awarding punitive damages under federal civil rights laws, requirement based on criminal law standard of "recklessness in its subjective form"). The civil standard for "recklessness" thus includes an objective test that is met when the actor "does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so." Restatement (Second) of Torts, *supra*, § 500 cmt. a.[3]

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[3] Of course, one must know the facts that create the risk and must intend to do the act that amounts to recklessness. Restatement (Second) of Torts, *supra*, § 500 cmts. a and b. There is no dispute in this case, however, about whether petitioners intended

The ultimate question for the ARB thus was not whether the record contained factual disputes concerning petitioners' motives and beliefs, but whether petitioners acted in objectively reckless disregard of whether their conduct would violate 10 C.F.R. 50.59(a)(1) and other safety rules. Similarly, the question before the court of appeals was whether the ARB's legal standard under Section 211(g) was reasonable (as petitioners concede it was) and whether the ARB properly found that there were no genuine questions of material fact concerning whether that standard was satisfied. Although the court's opinion does mention the "substantial evidence test" (Pet. App. 5), the result below does not appear to depend on any use of that test to resolve any disputed factual issues concerning petitioners' state of mind. To the contrary, the court relied upon the "undisputed" facts before the ARB, *id.* at 3, 4; noted that the ARB had found "no genuine issue of material fact," *id.* at 4; and found it "clear from the record" that Section 211(g) applies to petitioners' conduct because, "*regardless* of their motives, good or bad," petitioners conducted unauthorized "experiments *inherently* fraught with danger," Pet. App. 5-6 (emphasis added).[4]

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to, and did, increase the hydrogen pressure and lower the water level on September 4 and 5, 1994.

[4] The court added that petitioners had "moved knowingly and dangerously" beyond their authority and were "fully aware" that their employer would not approve of their experiments. Pet. App. 5. The import of that statement is unclear, but it may have been intended to address not whether petitioners acted with reckless disregard of applicable rules—the issue that petitioners contest here—but whether they had "direction from [their] employer" (42 U.S.C. 5851(g)) to act as they did. Similarly, although the Board commented that petitioners "were well aware of the danger of

To be sure, petitioners disagree (Pet. 8-11, 24-25) that their conduct was "reckless" in this objective sense despite the Board's determination (Pet. App. 33) that they "did not have actual knowledge [that their operational evolutions] would cause a violation of the ERA or the Atomic Energy Act." That factbound dispute, however, does not warrant review by this Court.

2. Even if the court of appeals' holding could somehow be attributed to a deferential substantial evidence standard of review of factual issues, this Court's review still would not be warranted, because petitioners have identified no conflict on that question with decisions of this Court or other courts of appeals.

The cases upon which petitioners rely as evidence of a "conflict" (see Pet. 13-19) arose under different statutory schemes and did not hold that, as a general rule, any summary decision of any agency must be reviewed wholly de novo. See, *e.g.*, *Agosto* v. *INS*, 436 U.S. 748, 753 (1978) (applying statute implementing constitutional requirement of "*de novo* judicial determination of claims to American citizenship in deportation proceedings"); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 622-623 n.19 (1973) (finding "substantial evidence" standard inapplicable to "initial agency determination whether a hearing is required," without discussing whether some form of deference might nonetheless be appropriate in some circumstances); *John D. Copanos & Sons, Inc.* v. *FDA*, 854 F.2d 510, 523 (D.C. Cir. 1988) (upholding FDA summary judgment standards without addressing standard of judicial

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operating the reactor" in the way that they did (Pet. App. 34), their awareness of a risk of nuclear "catastrophe" (*ibid.*) is of course not a necessary element of a finding that they acted in objectively reckless disregard of applicable safety rules.

review).[5] Indeed, the courts of appeals have sometimes upheld agency denials of hearings under an "arbitrary and capricious" standard. See *Adams* v. *EPA*, 38 F.3d 43, 49, 54-58 (1st Cir. 1994); see also *Puerto Rico Aqueduct & Sewer Auth.* v. *EPA*, 35 F.3d 600, 604-607 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995); compare Pet. App. 5 ("The substantial evidence test is no more than a recitation of the application of the 'arbitrary and capricious' standard to factual findings.").

Petitioners are similarly mistaken in relying on cases (see Pet. 16-17) involving ordinary appeals from district court summary judgment orders under Rule 56 of the Federal Rules of Civil Procedure. An agency's use of general summary judgment standards does not necessarily require a reviewing court to apply the same de novo standard that it would apply in reviewing the summary judgment order of a court. A more lenient standard for summary agency action may be justifiable insofar as agencies have more discretion than district courts to set their own adjudicatory procedures and have recognized expertise in addressing factual issues within their statutory jurisdiction. See generally

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[5] The court of appeals' passing reference to substantial evidence was so perfunctory that it does not constitute meaningful "precedent" on the issue, despite petitioners' assertion to the contrary (Pet. 19). Given the court's mistaken reference in its description of the proceedings to an "evidentiary hearing" before the ALJ (Pet. App. 4; see also Pet. 15), the decision below could hardly be cited for the proposition that the substantial evidence test applies even when the underlying agency determination did *not* involve an evidentiary hearing. Compare Pet. 15-19. Moreover, in the same paragraph in which the court made that reference, it proceeded to observe that the ALJ had relied on "undisputed facts" and that the ARB had issued its decision after "[f]inding no genuine issue of material fact." Pet. App. 4. It was on the latter basis that the court affirmed the ARB's decision. See *id.* at 5-6.

PBGC v. *LTV Corp.*, 496 U.S. 633, 653-656 (1990); *Weinberger*, 412 U.S. at 622; *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442 (1977); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492 (1951). And petitioners cite no authority holding that a court may never give any deference to an agency's determination concerning whether there is a "genuine issue of material fact," particularly where (as here) that determination is bound up in the agency's interpretation of the relevant legal standard, which undeniably is entitled to deference.[6]

Here, to the uncertain extent that the court of appeals actually relied for its decision on the "substantial evidence" test (see pp. 7-9, *supra*), it apparently viewed that test as relevant to whether the ARB was correct in "[f]inding no genuine issue of material fact" (Pet. App. 4) on the question of petitioners' recklessness—or to whether the ARB then reasonably concluded on the basis of the undisputed facts that petitioners' conduct fell within Section 211(g). The court did not, as petitioners appear to suggest (Pet. 16-17, 22), view the test as enabling it to resolve (or avoid) a *disputed* question of fact as to whether petitioners acted recklessly. Read

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[6] To the extent that petitioners contend (Pet. 19-25) that the Due Process Clause affords procedural protections in this context beyond those provided under the APA and the applicable administrative rules, they are mistaken. See generally *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). And, in contending that due process "require[s] an agency to convene an evidentiary hearing when it does not appear conclusively from the available evidence that the case can only be decided one way," Pet. 20 (emphasis omitted), petitioners simply disagree with the ARB's factbound conclusion that a summary decision was appropriate in this case because they had identified no disputed question of material fact.

in this way, the court of appeals' opinion suggests no more than that the facts on which the ARB may rely in entering a summary decision must be not only "undisputed" but also sufficiently "substantial" (*e.g.*, more than an undisputed scintilla of evidence) to support a decision on the merits. See generally *Universal Camera Corp.*, 340 U.S. at 477. Petitioners do not explain how they could have been prejudiced by judicial review that scrutinized the ARB's decision to ensure that the evidence against their position was not only "undisputed" but also "substantial."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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